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Nos. 85-93 and 85-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Were the salary claims correctly rejected when:

   a) No pattern or practice of intentional racial discrimination was found by the district court and the jobs of NCAES agents were not found to be similar or typical because of county by county differences and,

   b) The statistical evidence was properly rejected as being inaccurate and failing to utilize known valid non-discriminatory factors affecting each agent's salary in a different manner?

2. Were the claims of discrimination in connection with selection of county extension chairmen correctly rejected when:

   a) The district court and court of appeals properly applied disparate treatment analysis requiring proof of intentional discrimination in connection with decisions to select county extension chairmen, and

   b) The county chairman selection process and statistics, analyzed according to *Teamsters* and *Hazelwood* revealed no intentional discrimination in violation of Title VII and 42 U.S.C. Section 1983, and

   c) The district court and court of appeals analysis of county extension chairmanship claims was not in conflict with *Arizona Governing Committee v. Norris*, 403 U.S. 1073 (1983)?

3. Were the claims of violation of Title VI in connection with the 4-H and Homemaker Extension programs correctly rejected when there was no evidence of discrimination or denial of services in connection with the programs?

4. Was class certification correctly denied pursuant to Rule 23, Federal Rules of Civil Procedure when:

a) The facts showed that NCAES employees were not similarly situated and lacked commonality in connection with their employment conditions, and

b) The facts showed that the 100 boards of county commissioners proposed as a defendant class were each independent and autonomous in connection with each county's NCAES program and employment, and

c) The case was tried as a pattern or practice case with both petitioners seeking the same relief?

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

This action was instituted in the U. S. District Court for the Eastern District of North Carolina on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (NCAES) alleging racial discrimination in employment and the provision of services by NCAES on behalf of 5 purported classes of blacks and indians. The United States was named as a defendant in the original action but was allowed to become a plaintiff and intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1.

The United States was permitted to amend its complaint in intervention by Order of October 9, 1979, to include allegations of a pattern and practice of racial discrimination in violation of Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Class action certification sought by the plaintiffs and the United States was denied. (J.A. 73-79)

On November 23, 1981, the plaintiffs moved to amend their complaint to allege violations of Title VII and the motion was allowed. The defendants denied all allegations of discrimination. The nonbifurcated trial of this action began on December 7, 1981, and ended with final arguments on February 12, 1982. Counsel for the United States and plaintiffs acknowledged that the case was one of alleged disparate treatment and that the plaintiffs and the United States had the burden of proving a pattern or practice of intentional discrimination against the defendants. (Tr. 10,13,16). The plaintiffs and the United States joined in common cause, called over 46 witnesses to testify, and introduced over 400 of exhibits. They rested their case on December 29, 1981. (Tr. 3021, C.A. App. 49)

The defendants' case began on December 31, 1981 and the defendants called over 15 witnesses and introduced over 250 exhibits. The United States and the private plaintiffs took one day for rebuttal. (Tr. 6411-6617). (C.A. App. 102) (Tr. Vol. 32).

On August 20, 1982 and September 17, 1982, the Court entered Judgments dismissing all claims against NCAES. In its decision of August 20, 1982, the Court found as follows:

(a) That this was not a proper action to be certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. (C.A. App. 49) This Finding was appealed.

(b) That blacks are not discriminated against in geographical employment assignments in NCAES. (C.A. App. 53) *This Finding was not appealed.*

(c) That NCAES does not discriminate in recruitment of black professional employees. (C.A. App. 53) *This Finding was not appealed.*

(d) That NCAES does not discriminate in hiring black professionals at the county and state levels and NCAES's selection procedures are non-discriminatory. (C.A. App. 62) *This Finding was not appealed.*

(e) That NCAES does not discriminate in assignments of professional personnel to areas of responsibility (i.e. crops, livestock). (C.A. App. 64) *This Finding was not appealed.*

(f) That NCAES does not discriminate in title promotions of county level professional employees (from assistant to associate to full agent) and the performance evaluation system used in connection with promotions of county level professionals was valid, and non-discriminatory. (C.A. App. 74) *This Finding was not appealed.*

(g) That NCAES does not discriminate in the selection of county extension chairmen. (C.A. App. 101) This Finding was appealed.

(h) That NCAES does not discriminate in the selection of state level positions such as director, program leaders, specialists, and district chairmen. (C.A. App. 106) *This Finding was not appealed.*

(i) That NCAES does not discriminate with respect to terms, conditions and privileges of employment. (C.A. App. 72) *This Finding was not appealed.*

(j) That NCAES does not discriminate in connection with salaries. (C.A. App. 150) This Finding was appealed.

(k) That NCAES does not discriminate in work assignments. (C.A. App. 152). *This Finding was not appealed.*

(l) That NCAES has established valid, non-discriminatory qualifications, tests, selection standards and procedures in hiring and promotion. (C.A. App. 158) *This Finding was not appealed.*

(m) That NCAES has taken appropriate action to correct the present effects of past racially discriminatory policies and practices. (C.A. App. 163). *This Finding was not appealed.*

(n) That NCAES provides equal services to minorities. (C.A. App. 164). *This Finding was not appealed.*

(o) That NCAES' services to farmers and other persons are provided on non-racially segregated basis. (C.A. App. 164). *This Finding was not appealed.*

(p) That NCAES is not in violation of Title VI in the delivery of services to 4-H and Extension Homemaker Clubs. (C.A. App. 185). This Finding was appealed by Petitioners but not by the United States. *The United States now argues that the decision be affirmed.* (Brief U.S. p. 37-50)

(q) That the case was a disparate treatment case, and NCAES did not engage in a pattern or practice of racial discrimination. (C.A. App. 205)

In its decision of September 17, 1982, the Court analyzed the individual claims of 42 plaintiffs and determined that none were entitled to relief. (Pet. App. 215a-345a)

The United States and Petitioners appealed to the fourth circuit. The United States appealed from only *3* of the 16 adverse rulings. The plaintiffs appealed from only *4* of the foregoing adverse rulings: salaries, county extension chairmen, 4-H and Home Economics and class action denial.[1]

Decision was rendered by the court of appeals on December 10, 1984, affirming the district court's two judgments. Judge Phillips dissented on three claims, to wit: the 4-H Club claims, class action and salaries. He affirmed in all other respects. Petitions for Rehearing and rehearing *en banc* were denied by an evenly decided court on April 15, 1985.

STATEMENT OF FACTS

Preface

It is important to bring this case into proper focus and perspective. This case involved considerable time in trial and took both the district court and the court of appeals a long time to decide. A review of the district court opinions on the pattern or practice claims and the individual claims reveals careful consideration, thought and study by the district court in reaching and explaining its decision to deny all claims for relief. The United States and plaintiffs attacked each and every facet of the NCAES employment practice from initial hire to salaries and promotions. The United States and plaintiffs claimed discrimination in the services provided by the NCAES to

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[1] References throughout this brief to the Court of Appeals appendix which appear in the following format: (C.A. App. 0000"B" or "Y") contain a reference to the defendants' proposed findings of fact which were marked by plaintiffs and the United States pursuant to the district court's instructions in either red, blue or yellow. "B" refers to facts which were marked in blue and means facts not in dispute. "Y" refers to facts which were marked in yellow and means facts not in dispute but considered irrelevant by plaintiffs. Copies of the defendants' proposed findings of fact marked by the United States and private plaintiffs are found in docket number 231, 232.

the people of North Carolina. Yet a review of the petitioners' briefs filed with this Court, and the Petitions for Writ of Certiorari which brought the case here do not present an accurate factual picture of NCAES or its employment practices as a whole.

Why are the facts about NCAES relating to all issues that were tried important? The answer is simple. The petitioners and the United States tried this case as a pattern or practice action under Title VII asserting claims of intentional discrimination (disparate treatment) by NCAES against blacks. At trial the evidence showed that NCAES agents, due to the structure of NCAES and county by county vacancies, were not performing the same jobs or similarly situated, whether black or white. Yet petitioners assert that white agents and black agents perform the same work and are similarly situated. Also the facts about NCAES are important because petitioners cite *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) at length in reference to the burden of proof and other issues. By sweeping the facts about NCAES and non appealed issues under the rug, they fail to state that *Teamsters* required them to prove a pattern or practice by showing racial discrimination was NCAES' standard operating procedure and usual practice. *Teamsters, supra*, 336.

The district court found (1) no discrimination in hiring (2) no discrimination in recruitment (3) no discrimination in service training (4) no discrimination in NCAES providing blacks with opportunities to secure masters degrees while employed (5) that NCAES had used a valid, non-discriminatory performance evaluation system (6) that NCAES utilized the valid, non-discriminatory performance evaluation system in promoting blacks and whites in agent positions and in determining merit salary raises (7) that NCAES did not discriminate in assignments and (8) that NCAES did not discriminate in selection of county extension chairman or any of its programs. This is further bolstered by the decision on

individual claims in which the district court carefully weighed the evidence in each case and found no discrimination. In employment, only salaries and chairmanship selection were appealed. In these two employment issues, petitioners argue that a pattern or practice of discrimination was the regular standard operating procedure while omitting to mention that no regular systemwide pattern or matter of discrimination was found.

Petitioners have elected to omit the total picture from their arguments and to rest on the inaccurate claim that white agents and black agents perform the same jobs in similarly situated environments as if NCAES were a factory setting. Because of this, a review of the facts relating to NCAES's organization, employment practices and services is required so that fair balance and equilibrium can be re-established.

Organization of the
North Carolina Agricultural Extension Service

NCAES' programs and functions are educational in nature and are of great social and economic importance to the citizens of North Carolina and the counties where they reside. NCAES' programs and areas of emphasis fall into four general categories: agriculture, home economics, 4-H youth development and community resource development (CRD). (C.A. App. 212"B").

The State of North Carolina is composed of 100 counties and the Cherokee Indian Reservation. Each county has its own governing body known as the Board of County Commissioners. The County Commissioners are autonomous. The relationship between the Boards of County Commissioners and the NCAES is set forth in a "Memorandum of Understanding" executed by each county and NCAES. (C.A. App. 212"B", J.A. 161).

Under the Memorandum of Understanding, the Extension staff recommended by the NCAES to each county must be concurred in by the County Commissioners. In all instances, the person or persons recommended by

NCAES for consideration as County Extension Chairman is approved by the Board of County Commissioners. County contributions to professional salaries vary from county to county depending on factors such as county size, county wealth and tax base, county interest in the program the agricultural or rural thrust and nature of the county itself. (C.A. App. 213, 541-50, 1683-87, 2181).

North Carolina counties vary greatly in population, rural/urban population, size, racial makeup, topography, agrarian needs and resources, NCAES determines the agricultural, 4-H, home economics and community development needs of each individual county with the help of a system of advisory councils known as the County Extension Advisory Leadership System. (C.A. App. 213-14 "Y").

Because of the wide variance among North Carolina's counties, the requirements for extension staff vary greatly from county to county. The needs of a particular county dictate the areas of subject matter responsibility and training that extension agents must possess to serve within the particular county. (C.A. App. 216 "Y"). Agents cannot be required to move from county to county nor fill an opening for which the agent is not qualified by education, training or interest to fill. (C.A. App. 216, 560-67, 599-605, 2753).

One cannot review the employment or salary situations of NCAES county level professional staff without first looking at the individual needs and the conditions of the particular county at the time that such an employment or salary decision was made. (C.A. App. 216, 510, 599-608).

The head of the Extension Service is the Director and Associate Dean of the School of Agriculture and Life Sciences at North Carolina State University. There is an Associate Director. Directly beneath the Associate Director there are five Assistant Directors of the Extension Service. (C.A. App. 217-18 "B").

There are six District Extension Chairmen. The District Extension Chairman is responsible for administering all extension personnel and programs in each of the counties within his or her district. (C.A. App. 218 "B").

The Extension Service employs specialists. A Specialist has technical expertise in a particular subject matter area and provides technical assistance at the county and/or district level. Approximately two-thirds (2/3) have Ph.D. degrees. (C.A. App. 218-19 "B").

There are twelve District Program Leaders. Each program leader has responsibility in two of the six districts in one of the program areas: (1) Home Economics; (2) Agriculture; (3) Community Development; or (4) 4-H.

There is a County Extension Chairman position in each county which is the top county administrative position. The County Chairman (CEC), is responsible for carrying out an effective county extension program. The CEC also carries particular subject matter responsibilities such as agronomy, tobacco, 4-H, or home economics depending on the needs of the county and expertise of the staff. The CEC reports to the County Commissioners and works with them on budgeting and personnel matters which require county funds and participation. (C.A. App. 220 "B").

The County Extension Agent is responsible for assigned areas of subject matter responsibility. Agents are employed to work in a particular county position for which they must apply. (C.A. App. 54). There are three ranks of Extension Agents. The first is Assistant. The second is Associate requiring 3 years of service or equivalent experience. The third is called Extension Agent and requires a minimum of seven years of service or equivalent experiences. Educational degrees may reduce service year requirements. The Assistant, Associate, and Extension Agent perform the same types of tasks within their subject matter areas such as livestock or Home Economics. When an agent is promoted, his or her responsibilities increase and a higher level of performance

is expected. (C.A. App. 221 "B", 589, 99, 1035-38, 1174-75, 2235, 2253-75).

An agent is employed to fill a vacant position, for which the agent was selected by virtue of his or her skill and training. (C.A. App. 222 "B", 54).

Most agents' and chairmen's salaries consist of a federal share, a state share, and a county share. The federal government allocates money each fiscal year. These funds are combined with funds appropriated by the General Assembly to support salaries of Extension employees. (C.A. App. 223 "B"). The NCAES in consultation with the Board of County Commissioners determines what the state's share of each agent's salary in that particular county will be and what share the county will pay. The percentage of salaries that were paid from county funds in 1981 ranged from a high of 57% in Forsyth County to a low of 18% in Camden County. This percentage variation results in differences between salaries from county to county and agent to agent. (C.A. App. 223 "B", 546-51, 598-610, 1321-24, 2181-90).

Agricultural Program

The largest program area of the NCAES is its agricultural program which educates and encourages farmers to adapt scientific methods to meet individual needs and to adjust to changing economic conditions. Approximately 47-50% of all NCAES professional time is spent on agricultural programs. (C.A. App. 47, 224 "B", 2324-25).

The agricultural programs within NCAES are determined by the needs of the particular counties and varies greatly with each individual county and region of the state. (C.A. App. 224 "Y", 226 "Y").

Petitioners alleged racial discrimination in agricultural programs but there was no evidence to support the allegations of trial. At the close of petitioners' evidence, Counsel for the government conceded that the defendants

were not discriminatory in connection with services. (Tr. 3285-6, 672).

The Extension Home Economics Program

An extension home economics program is operated in each of North Carolina's 100 counties and the Cherokee Indian Reservation. The home economics program helps families solve problems and improve the quality of their lives through educational programs. Approximately 17.5%-23% of extension professionals' time is spent in the Home Economics program. (C.A. App. 228 "B", 260, 2325).

Programs are delivered at the county level by home economics agents and volunteers. (C.A. App. 228 "B").

Special Interest groups are open without regard to race and are formed to provide short term education on a particular subject within Home Economics.

Extension Homemaker clubs are volunteer groups organized to receive an educational in home economics through agents and volunteers. Club members participate on a strictly voluntary basis. Membership is open to everyone. Some clubs have members of one race both all black and all white and some are integrated. Only about 20% of total extension home economics program relate to these clubs. (C.A. App. 233, 573-74, 1390-92).

The district court found that there was no inequality of service and memberships were entirely voluntary. No black or white member of any extension homemaker club came forward and testified there had been any discrimination in services or membership. (C.A. App. 93,96)

The district court found that NCAES has organized all phases of activity above the community club level on a completely integrated basis and all agents worked with clubs across racial lines. (C.A. App. 234, 1390, Johnson D. 56, 51).

It has been the policy of NCAES that all extension homemaker clubs be organized without regard to race.

Prior to 1970 and thereafter all extension homemaker clubs were requested to certify membership would be open without regard to race. All clubs executed such certificates and they are on file with NCAES. NCAES' home economics agents encourage the formation of clubs without regard to race. Public media and publications carry announcements of formation of clubs and state that they are open without regard to race. (C.A. App. 96, 233, 854, 858, 866-68, 876, 886-87, 973, 1003, 1393-95). The district court found no discrimination in any aspects of the program. (Pet. App. 184a-185a)

Despite the policy that extension homemaker clubs be organized without regard to race, clubs do exist with members of only one race. Recognizing that the services and benefits that NCAES should provide to individual citizens *without regard to race* NCAES decided to continue to provide support to the extension homemaker clubs which had members of only one race rather than to deprive citizens of obtaining beneficial information. The district court found that the clubs have not denied anyone membership on the basis of race nor subjected anyone to discrimination. (Pet. App. 185a)

The private petitioners appealed only with respect to one race clubs while the U.S. argues the district court was correct.

4-H and Youth Program in North Carolina

The 4-H and Youth Program in North Carolina is one of the four major educational programs of the NCAES. The 4-H program is designed to develop good character and citizenship and to teach youth useful and practical skills. (A. 235 "B").

The 4-H program operated primarily in the schools until the early 1960's when a decision was made to develop a community based 4-H program. Since the early 60's the 4-H program has been an informal, voluntary and out-of-school educational endeavor. (C.A. App. 235 "B").

During the 1980 program year more than 95,000 young people and 15,000 adults took part in 4-H. It is the policy of NCAES that 4-H programs be operated without regard to race. (C.A. App. 236 "Y", 1013-16, 1074-77, 1092-93, 1095-98).

The local 4-H unit—be it a community club, or special interest group—is largely autonomous and completely voluntary. A volunteer adult is the leader. NCAES staff stress that all 4-H clubs and functions are open without regard to race. (C.A. App. 237, 844, 939-44, 1092-98, T. 4249, 5108-10).

The 4-H program is publicly supported by county, state and federal governments. For every $1 of public expenditure, there is a contribution of private money or services, amounting to $5-$6. The value of 4-H volunteers time exceeds $10 million. (C.A. App. 238 "Y", "B").

Within the county 4-H program there are 3 grass roots level organizations, community clubs, project clubs and special interest groups. None exclude participants on the basis of race. Within North Carolina there are community clubs which have members of one race and community clubs which have members of all races. NCAES does not participate directly in the administration of community clubs. However, NCAES 4-H agents assist in the organization efforts, Announcements are made that clubs will be organized without regard to race. 4-H agents encourage community clubs to form with both races when that club is in a racially mixed community. (C.A. App. 238 "B", 954-58, 1094-98, T. 4430-33).

4-H Special Interest groups are formed to provide short term instruction on a particular subject and were pioneered in North Carolina. These volunteer operated groups were designed to include large numbers of youth without regard to race. (C.A. App. 239 "Y"). More youth participate in special interest clubs in North Carolina than in the community based 4-H clubs. (C.A. App. 239, 583-85, 868-70, 945, 1018-21, 1077). The petitioners attack is on the community 4-H clubs.

The 4-H program in each county is dependent on volunteer adult leaders. Leaders are encouraged to form clubs on an integrated basis. (C.A. App. 239 "B"). Above the community club level every phase of 4-H within each county is fully integrated. (C.A. App. 240, 844-46, 853-54, 1022-23, 1120-22).

Although many states in the south closed their 4-H camps in 1964 and 1965, NCAES continued camp operations. In 1965, NCAES began scheduling counties and clubs within counties to deliberately achieve an integrated mixture. By 1972, complete integration within NCAES' 4-H camps was achieved. (C.A. App. 240-41, 847-52, 948-54, 1013, 1024).

The population of North Carolina is approximately 22% percent black. 4-H membership has remained 32% percent or more black since 1972. Since 1972, volunteer leadership has nearly doubled with the percentage of black leaders 27% percent or greater. (C.A. App. 241, 1099, 1106, 111-12, 1123-27, 1142-55, 2249, 2250-5, 2252).

Despite the policy of NCAES that 4-H community clubs be organized without regard to race, clubs do exist with members of only one race. Recognizing the benefits 4-H provides without regard to race, NCAES decided to continue to provide support to 4-H clubs which had members of only one race rather than to deprive children from obtaining valuable experiences. These clubs have not denied anyone membership on the basis of race. (C.A. App. 241, 961-64, 1025-34, 1156-61).

No one came forward at trial and testified of any discrimination or inferior services in connection with the 4-H program, except one instance in which the offending volunteer adult was immediately removed. (Pet. App. 167a).

The Community Resource Development Program

The Community resource development is another major program of NCAES. Extension's community development programs give emphasis to group action through citizen

groups and organizations. These organizations conduct programs built around community problems and needs. (A. 47, 242 "B", DX-65). The district court found there was no racial discrimination in CRD programs. (C.A. App. 56, 88, 93).

NCAES Employment Practices

1. ***Recruitment-County Level Positions***

The District Court found that NCAES' recruiting practices were designed to obtain the highest qualified applicants. This finding was not appealed. (C.A. App. 246-348).

2. ***Hiring—County Level Professional Positions***

The differing agricultural, social and economic needs of North Carolina's one hundred counties require a great variety of educational background and areas of specialty. Each county is not staffed at the same level of county agent personnel and the minimum staff numbers 2 to staffs exceeding 10 in number. (C.A. App. 244, 599-608, DX 67-1-100). Since November 1972, NCAES has sent monthly vacancy announcements to educational institutions, and the extension office in each county. (C.A. App. 245-46 "B").

The needs and size of the particular county and its programs dictate the qualifications of agent applicants. The agent determines whether to apply. The work required in one position is not the same as required in another position. NCAES employees are hired to fill vacant positions for which they are qualified and can not be "assigned" from county to county. Applicants who lack the skills and background required in a county position vacancy are not considered. (C.A. App. 224, 250, 738-39, 748, 750, 1332-33).

The district court found that subject matter requirements differed for each vacancy because of the needs of each county. The district court also found that county hiring procedures were non-discriminatory, that no evi-

dence was offered to show one qualified black who applied was not accepted and that no employee was ever discharged on account of race. (Pet. App. 62a).

The district court also found that there was no discrimination in connection with hiring blacks to work in any particular county or assignments to an area of responsibility. (Pet. App. 64a) None of these findings was challenged on appeal.

3. *Hiring and Recruitment—State Level Positions*

State level professional positions comprised, as of November, 1981, some 200 positions or .30% of the professionals employed within NCAES. These positions are specialists, program leaders, district chairman, assistant directors and directors. (C.A. App. 2233). No discrimination was found in connection with state level positions and the district court found state level hiring procedures to be valid and to comply with all employment discrimination laws. (Pet. App. 106a) These findings were not appealed.

The Performance Evaluation System

The NCAES performance evaluation system was found by the district court to be valid and non-discriminatory. (Pet. App. 154a-158a). The petitioners have not challenged the district court's findings. The NCAES performance evaluation system is the means for evaluating county level professional employees' job performance as part of determining their eligibility for title promotion, merit salary increases and selection to the position of county extension chairman.

The *Performance Review Guide* is utilized in connection with the annual cycle of performance review, analysis and planning within NCAES. (C.A. App. 260-261 "B"). The district court specifically approved the evaluation process utilizing the *Performance Review Guide*, and found it valid and non-discriminatory. (Pet. App. 154a-158a).

The *Performance Review Guide* becomes the final evaluation and is retained by the district extension chairman for use in the agents title promotions and merit salary considerations. (C.A. App. 261-62 "B").

Promotions at the County Level Agent Positions

This segment of the NCAES employment practices is referred to as title promotions and involves the process of promotion of agents from assistant to associate to full agent. It does not include county extension chairman. The district court approved the title promotion process utilizing the performance evaluation system as valid and non-discriminatory. These findings were not appealed. (Pet. App. 73a-74a).

County Extension Chairmanship Selection Process

The position of County Extension Chairman ("CEC") is important within the Extension Service and is the top county administrative position. The CEC is responsible for carrying out an effective county extension program. He or she carries particular subject matter responsibilities depending on the needs of the county staff. The CEC reports to the County Commissioners on programs, budgeting and personnel which require county participation. (C.A. App. 220 "B", 275 "B").

From 1972, to May, 1981 there were 77 CEC vacancies. All were announced statewide by publication. The announcement listed the county and subject areas of responsibility the CEC must carry. (C.A. App. 275, 276, "B", 278, "B", 60). The district court found that "the claims of the plaintiffs based on alleged racial discrimination by the Extension service in the selection of county chairman must fail." (Pet. App. 101a).

The CEC is not in a promotional line with that of extension agent. The CEC of a particular county is a position which must be specifically applied for when a vacancy occurs. (C.A. App. 275, 779, 1334-40). The needs of the county dictate the skills required for each CEC.

An individual is eligible for consideration as a CEC upon completion of six years (formerly seven years) of service or equivalent experience. At least two years must have been with NCAES. A Master's degree is desirable. The position demands serious consideration in selection of a qualified candidate because of administrative and leadership requirements. The District Extension Chairman meets with the County Commissioners to discuss the particular subject matter competencies required by the county. Then the District Chairman and state administrative staff prepare the statewide vacancy announcement. (C.A. App. 275, 276 "B", 780, 1334-40, 1760-62).

Applicants must apply in writing and possess minimum qualifications to be considered and interviewed. Important factors are subject matter expertise required in the county, demonstrated leadership, demonstrated administrative and management capabilities, educational background, and human relations and communications skills. When an applicant is an agent within NCAES, his or her performance in managing extension programs is well known due to the performance evaluation system. (C.A. App. 276-77, 781-789, 1000, 1334-40).

The applicant is interviewed by the District Extension Chairman, the Assistant Director for County Operations, the Associate Director and Director of NCAES. Then the group comes to a consensus as to who they will recommend to the County where the vacancy occurs. (C.A. App. 277, 789-91, 1334-40).

In some instances, more than one applicant will be presented for interview and selection. In some instances one candidate will be presented. As the County Commissioners have a definite right of approval, they may dictate how they want the applicants presented. In all instances, the Board of County Commissioners have the final say as to whether to accept an applicant. (C.A. App. 277-78, 790, 98, 1334-40, T. 3362-63, 5962-65).

At trial petitioners pursued the claims of alleged racial discrimination in the CEC selection process on two fronts.

One was statistical and the other was by utilization of the testimony of individual blacks and plaintiffs who claimed that they had been discriminated against in the selection process or that they believed it "futile" to apply.

The district court had before it not only statistical evidence, but the evidence relating to some 23 blacks who claimed discrimination in the CEC selection. (Pet. App. 93a-101a, 227a-301a) Those 23 individuals, however, comprised all blacks who applied for CEC positions or claimed to be futility claimants for CEC from 1968-1981. (C.A. App. 1736-1742, 60-69, 115-161). In each instance, the district court found no discrimination with respect to these individuals' CEC selections. (Pet. App. 227a-321a). The district court found no pattern or practice of discrimination in CEC selection and determined that the post Act selection procedures were fairly and uniformally followed without bias or prejudice. (Pet. App. 101a)

The Salary Process

The salary process for NCAES county level professional positions is affected by a multitude of factors which interact with each individual agent's employment situation on the county level and clearly shows that agents are not similarly situated in terms of their jobs regardless of race. (C.A. App. 280, 628-30, A. 755, T. 1008, 3483).

The organization establishes a minimum entry level salary for all new employees at the Assistant Agent level with a bachelor's degree and no prior experience. A salary differential is offered to those holding a master's degree at the time of employment. (C.A. App. 280 "B"). On occasions, due to "market demand", the NCAES has paid more than minimum entry level in order to employ individuals in particular subject matter fields where skills were in short supply. There have been occasions when a new employee with prior relevant experience justified a salary higher than entry level. (C.A. App. 280, 2210, 2181-89, 1322-23).

In recent years, due to inflation, starting salaries have increased dramatically. In order to compete this has required NCAES to continually adjust its entry level salary. Because of this, new agents have been employed at salary levels close to agents with two years of tenure. To avoid negative impact on staff morale, NCAES adjusted salaries on a number of employees to bring them up to new minimum levels following each increase in entry level. In 1981 NCAES was forced to utilize $70,000 of its merit salary money to make these adjustments. (C.A. App. 280, 629-30, 643, 823, 990, 1008, 1389).

After initial employment, the individual agent or County Chairman's salary is affected at any given time by a great number of factors such as tenure, additional degrees obtained, area of specialization, area of responsibility, job performance, scope and complexity of the p ogram, ability of the county to pay, state and county across the board raises, state and county merit raises, competition in the marketplace for holders of certain educational background and skills, and competition between counties for a particular agent's talents, none of which have anything to do with race. (C.A. App. 281, 492, 547-48, 608-11, 631-34, 775-57, 992-93, 2210, 2181-89, T. 3483-87).

The financial ability of counties to support the local Extension program and the salaries of its agents varies considerably throughout the state. (C.A. App. 281 "B").

Most years, the General Assembly provides some type of across the board percentage pay increase or a flat sum. These raises are non-discriminatory and every NCAES employee gets them in the state/federal percentage of their salary. The amount will vary depending upon the percentage of state contribution to their salary in the county. (C.A. App. 281, 494, 644-50, T. 1182).

From time to time a county may grant across the board pay increases. Some counties may not grant such

increases at the same time. Such increases are non-discretionary and are administered in a non-discriminatory manner. The granting or failing to grant a salary increase in some counties and not in others causes variation in agents' salaries between counties. (C.A. App. 281-82, 639-44, 987-90).

Each year, approximately 10% of the counties make available to NCAES funds to provide merit salary increases based upon performance evaluation. This results in variation in salaries between agents in different counties. (C.A. App. 281-82, 535-37, 639-44, 760-61, 765-66, 770-73, 801-2, 819-23, 987-90).

Some years the General Assembly appropriates funds to provide state employees with "merit" salary increases. (C.A. App. 282 "B"). Merit salary increases do not occur on an annual basis. The major factor is job performance following the agent's last merit salary increase. (C.A. App. 282-3, 614-16, 760-761, 765-766, 770-773, 801-802, 819-823, 1322-23, 1382-83, DX 92, 92a, 93).

The valid job performance evaluation system forms the basis for determination of an agent's eligibility for a merit salary increase through the use of the quartiling process. Quartiling is *only* utilized in the allocation of state merit funds. (C.A. App. 283, 1382-1383).

The District Extension Chairman, based upon the agent's performance places each agent within one of four quartile groups. Because each agent's particular plan of work and job requirements differ from agent to agent and county to county, agents do not compete against other agents' performance to achieve a quartile ranking. Agents compete against themselves as their performance is measured on an individual basis. Once an agent is placed in a quartile, the agent is not ranked within the quartile. The four quartile groups rank all agents within the district regardless of their areas of responsibility, degree or tenure. (C.A. App. 283, 284-5, 612-23, 814-18, 1055-57, 1376-79, 1374-1383).

An agent whose performance has improved during the performance review period may move to a higher quartile. An agent whose performance has declined during the performance review period may drop to a lower quartile. (C.A. App. 284-5, 814-818, 1380-81, 1325-30).

An agent with two years of service can expect to be placed in the first quartile if he or she does an outstanding job, just as an agent with ten years service can expect to be placed in the first quartile for an outstanding job. The converse is also true. (C.A. App. 285, 814-18, 1374, 1382, 1386-1388).

Before the allocation of merit money can be made, the District Extension Chairman must first apply merit funds to agents' salaries to adjust for any increases by NCAES during the previous performance period in the entry level salary for positions of assistant, associate and full agents. (C.A. App. 286, 287 "B", 629-30, 823, 990, 1008, 1386-7).

An agent whose performance is fourth quartile usually will not receive a merit increase. However, the agent in the fourth quartile whose salary was below the entry level salary, will have received the "entry level" adjustment made prior to the merit salary allocation process. (C.A. App. 287 "B", 1386-7).

The dollar allocation to each agent within a quartile will basically be the same. (C.A. App. 228, 819-822, 1331-32, 1388).

The quartiling process highlights that NCAES agents are not performing the same jobs under the same conditions. From initial hire on, each agent competes against his or her own job performance goals for merit pay and his or her jobs is different in and of itself. This coupled with the variances between counties and different job responsibilities dictated by county needs makes each agent's job unique.

SUMMARY OF ARGUMENT

I. The court of appeals correctly decided the salary claims of petitioners in this disparate treatment case. The district court properly analyzed all claims by the allocation of proof set for disparate treatment cases, which claims require proof of intentional discrimination. The district court and court of appeals correctly followed *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973); *Teamsters v. United States*, 431 U.S. 234 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *United Airlines v. Evans*, 431 U.S. 533 (1977) in requiring petitioners to prove their assertions of intentional discrimination. In each instance, petitioners failed to do so. The existence of intentional discrimination is for the trial court to decide. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's two decisions clearly show this was carefully decided on the facts.

Petitioners tried this disparate treatment pattern or practice and individual claim case without regard to the particular facts surrounding NCAES, its special requirements for hiring, staffing and without regard to the real non-discriminatory factors which clearly affect salary differences between all agents irrespective of race. Petitioners come here asserting the same old arguments which have failed them in the past.

NCAES employees are professionals with college degrees required. Each of 100 counties has needs for different training and educational skills for NCAES agents. Salaries are not now, nor have they ever been, the same except for the minimum starting salary. From initial employment on, salaries of agents vary from county to county depending on performance, percentage of state versus county contribution and many other factors, none of which are racial. Petitioners submitted inaccurate comparisons and statistics which failed to utilize the proper factors affecting all agents salaries. NCAES refuted and rebutted such evidence and showed it to be

inaccurate and lacking in probative weight, which is permissible under standards set by this Court in *Dothard v. Rawlinson*, 433 U.S. 331 (1977) and *Teamsters*, supra. The district court and court of appeals properly rejected such evidence and improper statistics.

II. The district court and the court of appeals correctly rejected claims that the selection of county extension chairmen was discriminatory. Petitioners, utilizing inappropriate comparisons with respect to the selection process of the county extension chairman, the highest county level position in NCAES, failed to prove their case. The district court, applying the appropriate allocation of proof set out in *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), analyzed the statistical cases and individual claims against the evidence presented at trial. Petitioners failed to prove a discriminatory pattern or practice and each individual claim was found free from intentional discrimination. Petitioners assert the decision violates *Arizona Governing Board v. Norris*, 408 U.S. 1073 (1983). Once again, Petitioners avoid the facts.

NCAES and each of North Carolina's 100 counties are co-employers. NCAES recommends prospective employees to the County Commissioners. The decision must be one of joint acceptance. No responsibility is delegated to a third party. (Pet. App. 77a) *Norris* is not applicable to this case. The district court found no intentional discrimination on the part of NCAES or county commissioners thus the Title VII and Section 1981 claims were properly denied.

III. The district court and the fourth circuit correctly denied Petitioners claims that the NCAES 4-H and Homemaker Extension Club programs were operated in violation of Title VI and on a racially discriminatory basis. Out of thousands and thousands of voluntary black participants in the 4-H and Extension Home Economics programs since 1965 in North Carolina, not one came forward to testify that he or she had ever been subjected

to racial discrimination. The facts show no "freedom of choice" plan exists here. Both programs are voluntary and not mandatory public school attendance situations. NCAES affirmatively took action which eradicated pre-1965 segregation in 4-H and Extension Homemaker programs. Rather than withdraw support from one-race clubs which had not discriminated, NCAES elected to provide support without regard to race. The proof of the pudding is that out of the thousands of participants in those two programs none came forward to complain or assert any racial discrimination.

IV. The district court and the fourth circuit properly denied class certification in this case. The record clearly shows that class action was improper under Rule 23, Federal Rules of Civil Procedure because NCAES employees are not similarly situated and lack commonality in employment. Petitioners assert *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) was violated by both courts. *Eisen*, supra. dealt with two issues. The first was whether a class action determination was appealable under 28 U.S.C. § 1291 and the second was whether a district court, upon preliminary hearing on the merits, can require defendants to pay a part of the class notification costs. Neither issue is present in this case. The case was tried as a pattern or practice case in which the relief, had Petitioners won, would have been the same as if they had a proper class action, which they did not. Petitioners have pointed to no prejudice to their case by trying them as pattern or practice claims. The same relief is available either way. *General Telephone Company v. EEOC*, 446 U.S. 318 (1980). Even the elements of proving a prima facie case are the same in a pattern or practice case. *Cooper v. Federal Reserve Bank of Richmond*, 81 U.S. L.Ed.2d 718 (1984). The facts show that a class action is not appropriate here and the decisions do not conflict with decisions of this Court.

NCAES met the claims of petitioners and the United States head on in the trial of this case, responded to

each claim, and showed an organization free from racial discrimination. The decisions should be affirmed in all respects.

ARGUMENT

I. THE DENIAL OF THE SALARY CLAIMS WAS CORRECT AND SHOULD BE AFFIRMED

Petitioners claim error in the denial of salary claims. Before addressing petitioners salary arguments, we would like to recap the facts relating to NCAES and factors relating to salary affecting all county agents, regardless of race.

The organization of NCAES as described earlier in this brief is not contested. The existence of 100 separate counties as autonomous entities is not contested. That the financial contributions made by each 100 counties to its own extension program varies from county to county, is not contested. That the financial contribution from NCAES to the extension program of each individual county varies, is not contested. That the salaries paid to county level professionals varies from county to county is not contested. That when the State grants an across the board increase the amount received by county level agents varies according to the percentage of state/county contributions to the program, is not contested. That in any given year some counties may grant across the board raises to agents according to the percentage of that agent's salary paid by the county and other counties may not give any increase at all is not contested. That merit raises by the state affect salaries of individual agents based on their own performance is not contested. Only a small part of the overall funds is allocated to merit raises. That some counties may give merit salary increases in some years while others do not is not contested. That salaries paid to county extension chairmen vary widely between the county chairmen in 100 counties and that said salaries provide a maximum for county level staff in that county is not contested. In each of the 100 counties in North Carolina there exists a different level of salary due to the economic and agricultural pro-

grams of each county. Each of these separate factors creates salary differentials between agents and is not in any way attributable to an intentional statewide system of salary based upon race. (C.A. App. 212 "B", 213-14 "Y", 216 "Y", 220 "B", 221-222 "B", 223 "B", DX67-1-100, 275 "B", 281 "B", 282 "B", 286 "B", 287 "B".)

That each of the 100 counties has certain requirements which differ from other counties in connection with its extension program needs is not contested. Thus, a county whose chief agricultural commodities are livestock, poultry and truck farm crops will not require an agent whose educational training and background expertise is in tobacco or soybeans. A county whose major agricultural commodities are tobacco, soybeans and corn will not require an agent whose educational background and skills are in hog farming or cattle. It is uncontested that the needs of the individual counties dictate the needs and staff requirement of the extension program in each county and that those needs are different among the 100 counties. Thus, not every agent can be utilized in every county as their skills, experience and special qualifications vary with the county needs each meets. One cannot analyze the salary process of NCAES without understanding the uncontested factors that affect salaries of each agent. (C.A. App. 216 "Y", 221-222 "B", 224 "Y", 226 "Y", 275-278 "B", 280 "B", 281 "B") The petitioners do not dispute or seriously contest the facts which give rise to the differences between the needs of the counties, that such needs actually exist and that staffing is not uniform between counties because of the varying needs. The petitioners do not dispute or seriously contest the fact that these differences in county/state percentage of salary, merit raises, and other factors do in fact exist. They simply have elected to ignore them and proceed to analyze salary by utilizing an across the board average approach based on race, tenure, degree and title omitting the factors caused by the organization of NCAES and the differing needs and support between counties. The United States, in its brief, has acknowledged that county differ-

ences cause variances in salaries between counties. (U.S. Br., 30) The private petitioners continue to characterize them as "imaginary". The reason for this is that the facts show that any variances between agents, black or white, is not the result of any intentional racial discrimination.

A. NCAES agents, regardless of race, are not similarly situated nor performing the same jobs

The petitioners make inaccurate assertions that the lower court decisions permit NCAES to pay blacks less than whites in the same job and that the jobs of blacks and whites within the county level professional positions are the same or similarly situated.

Taking off from the inaccurate "less pay for same jobs" launching pad, petitioners equate the facts in this case with those of shift workers located in the same facility being paid different hourly rates based on sex in violation of the Equal Pay Act of 1963. After arguing that a violation of the Equal Pay Act is also a violation of Title VII and that the same principles should be applied to blacks being paid less than whites for the same jobs, the petitioners argue (1) that whites are paid more than blacks by virtue of a pre-Act and a post-Act discriminatory salary process, (2) that the NCAES has continued to engage in intentional salary discrimination in violation of Title VII and Section 1983, and (3) that their statistical evidence proved intentional discrimination, but was improperly rejected by the district court and court of appeals.

The NCAES employment system is unique, not uniform and because of real differences between positions, its professional level employees do not perform the same jobs nor are they similarly situated, be they black or white. As petitioners' contrary assertions are not correct, and NCAES contends the record proves they are not, their entire case must crumble and fail.

The fact that NCAES county level professionals are not doing the same jobs nor are they similarly situated in

terms of employment is shown by looking at the county by county differences and different factors affecting each agent's salary. These factors have been discussed in the Statement of Facts and at the beginning of this argument. (See pages 17-21 *infra*) Because of these differences each county program is unique and NCAES county level professionals work within each program at separate tasks dictated by the need of that particular county and do not do the same jobs or have the name responsibilities to be characterized as similar.

With respect to salaries, external non-discriminatory factors such as percentage increase in salary, degree, tenure, county percentage of pay, across the board increase, and merit proves that each professional, black or white, is not doing the same job nor are they similarly situated.

The quartile system is a clear reflection of the fact that each agent not only competes against himself or herself, but that the reason for this is that each agent's job requirements and work is different than others. If each agent were doing the "same job" or were "similarly situated" in terms of employment, the performance of each agent in a particular subject matter area, level or program would be measured against the other agents in that area, level or program. (Pet. App. 113a, n.31)

If the assertions made by petitioners that county employees have similar jobs and do the same jobs such that they fit nicely into the Equal Pay Act arguments and theories put forward to this Court, why are the highest ranking administrative jobs in the 100 county offices different in terms of salary? The record is undisputed that the pay of CECs vary from county to county from year to year by thousands of dollars. (J.A. 165-167) The answer is simple. CEC's do not do the same jobs either. The CEC's salary is also a "cap" on the salaries of agents on each staff, regardless of tenure, degrees, performance and areas of specialty. (DX-67-1-67-100)

The record clearly shows that just because an agent bears the title agricultural extension agent or 4-H agent,

his or her job is not the same nor are his or her employment conditions similar to an agent bearing the same title located within another county. Each works to fulfill the goals of his or her own plan of work dictated by the program needs of the county in which the agent is employed. (Pet. App. 114a) The district court acknowledged these facts in denying an employee class. (J.A. 78)

The U.S. now acknowledges that it is undisputed that salary levels vary from county to county and that such a factor should have been included as a variable in considering salary claims. (U.S.Br.30) Petitioners' premise that blacks receive less pay than whites for doing the same job in similarly situated settings must be disregarded.

B. The District Court and Court of Appeals correctly applied Teamsters, Hazelwood and Evans to the salary claims

Petitioners argue that the district court and court of appeals erroneously applied *Teamsters Hazelwood*, and *Evans* in connection with the pre-1965 salary differences between black and white NCAES county employees. Petitioners claim that the differences in salaries were the result of intentional salary discrimination and even if NCAES acted in a completely non-discriminatory manner in its salary process from 1965 forward any difference in salaries resulting from before the effective date of the Act in 1965 constituted a continuing violation of Title VII.

The court of appeals disagreed that this was the law. "A public employer who from this date forward (date of the Act) made all its employment decisions in a wholly non-discriminatory way did not violate Title VII even if it had maintained an all white work force by purposefully excluding Negroes." *Hazelwood School District v. United States*, 433 U.S. 99 (1977). This language in *Hazelwood* was relied upon by both courts in reaching their decision. The court of appeals held that any so-called "lingering effects" of pre-1965 salary differences was not actionable. (Pet. App. 389a)

While there can be no denial that prior to 1965, the NCAES was divided into a white and black branch, the record does not reveal that NCAES set any "wage scales" for blacks or whites. The jobs of the blacks, as were jobs of whites, were not similar before 1965 or after 1965 for the reasons previously stated and set out in the Statement of Facts.

The reason petitioners must make their intentional "wage scale" argument with respect to the pre-1965 situation is that this is a disparate treatment case and intent is required. A disparity in salary alone does not meet the burden of proof under Title VII disparate treatment. (U.S. Br., 20, n.18)

Thus, petitioners argue that any wage differences existing before 1965 were a result of intentional discrimination and that

> "black employees hired before 1965, because of their race, have received and continue to receive lower salaries than white employees who have been performing the same job for the same length of time." (U.S.Br.14)

C. The evidence does not reveal any Pre-Act intentionally set wage scales existed in NCAES

Petitioners argue that because Bazemore's base wages were established prior to 1965, NCAES could "indefinitely" to pay him and others like him lower salaries than wages paid to whites. (Pet. Br. 7) Bazemore's salary as an agent in 1971 was $13,342. Bazemore was making more money than the CECs in 47 counties in 1971. (DX-67-51, J.A. 165-167)

The district court found that the salaries of black agents in the pre-65 segregated system were lower than the salaries of white agents. The district court found that prior to the 1965 merger, the Negro Branch was headed by the "Negro state agent", R.E. Jones, a black male who was responsible for the budget and state plan of work of the Negro branch, including the hiring, promotion, dis-

cipline, discharge and *salary determination* of all black personnel. (Pet. App. 28a-29a) Neither petitioner called Jones as a witness, electing instead to introduce his deposition and an excerpt thereof. (GX-144.2) Jones testified that salary and salary increases recommend by him were almost automatically concurred in by NCAES. Jones did the hiring and set the starting salaries. Jones did not claim that his branch was discriminated against in budget allocations nor did Jones testify that separate wage scales were established or forced upon him for black agents in the pre-65 system. (GX-144.2)

Whatever salaries were established for agents hired by R.E. ones, the black administrator, they cannot be said to have been deliberately set on the basis of race by R.E. Jones and the record is devoid of any evidence to that effect. It flies in the face of reason that whatever Jones' decided in terms of salary or increases was set with deliberate intent to discriminate.

Another piece of evidence which petitioners contend show that average salaries differed because of intentional discrimination by NCAES is the Blalock Memorandum of 1971, GX-157. (J.A. 129) Petitioners' assertions on that point were not supported by findings of the district court. The reason for this is that Blalock was grappling with the average difference problem and not trying to maintain average differences at all. His memorandum refers to factors which explained average differences in salaries which were real, such as the competitive market. (J.A. 91)

Blalock testified about GX-157:

> ". . . I am simply stating that this is a reflection of what existed not only in North Carolina but throughout the country. At that point in time, there was a difference . . . not because of intentional discrimination on anybody's part but reflecting the fact that home economics agents could be hired at lower salary that white agents could . . . and I might add and I think it is a reflection of the fact that black agricul-

> tural agents could be hired and retained at a lower salary than white agricultural agents." (C.A.App. 995-999)

This explanation clearly shows that any resulting differences between blacks and whites, agricultural agents and home economics agents, were not the result of intentional racial discrimination. Blalock was trying to solve the disparity situation within the financial resources and the unique salary structure of NCAES.

> "That was a figure that I concluded that we ought to do to make adjustments in salaries that we needed to make at that time in response to the changing salary structures of our entry level salaries and in response to what we knew we were going to have to do as a result of the EEO Act." (C.A.App.900)

The record shows that NCAES did attempt to make adjustments within its budgetary parameters and visited each county separately to explain the situation and ask for support in the endeavor. (C.A. App. 900-903) Such efforts were made to reduce the average differences but due to the county by county salary differences and finding structure 1971, the averages were not eliminated. (Pet. App. 389a-90a) There is no evidence to support petitioners' claim that "the practice of fixing salaries or raises on the basis of race did not end in 1965" (Pet. Br. 8, 9).

Neither court below made a finding that the differences were based on intentionally set wage scales. The district court found that prior to the merger in 1965 the salaries of "professionals in the black branch on the average were less than those of their counterparts in the white branch". The Court also found that the disparity was recognized and steps taken to begin its elimination. (C.A. App. 120a-121a)

The district court made a *separate finding* with respect to the petitioners' claims that NCAES has failed to correct past effects of past discrimination. No appeal was taken from this finding. The district court stated:

> "The allegation is that defendants have failed and refused 'to take appropriate action to correct the present effects of ast racially discriminatory policies and practices.' Here again the allegation involves the assumption that there has been discrimination in the past the effects of which continue, a thesis staunchly denied by defendants . . . A violation by the defendant of any duty, statutory or otherwise, 'to take appropriate action to correct the present effects of past racially discriminatory policies and practices' has not been established." (Pet. App. 158a-163a)

The court of appeals acknowledged that salary disparities which had existed between the two branches were not immediately eliminated, but that by 1972 when Title VII became applicable to NCAES, that NCAES had "already been operating on a nondiscriminatory basis for about 6 years" and that since the merger in 1965, the NCAES had set a minimum starting salary for all new county level agents. (Pet. App. 360a) The court of appeals recognized that the disparities were reflected from the pre 1965 discriminatory structure of NCAES but did not find such salary disparities resulted from intentionally set wage scales. (Pet. App. 359a, 384a, 389a)

NCAES contends the differences in salaries then, as now, are due to the factors shown by the evidence to actually affect salaries between agents, not race.

It is undisputed that since 1965 there has been a uniform minimum starting salary for entrance level positions. (Pet. App. 384a). Thus the focus for petitioners claims is on pre 65 black agents who were "doomed" forever to being paid less than whites doing the same job. (Pet. Br. 24)

An examination of the pay data for agricultural extension agents who were employed as of the effective date of the Act in 1965 and on July 1, 1972 reveals that there were 42 black agricultural agents and 65 white agricultural agents in that category. Taking petitioners asser-

tions to their conclusion, the pre 1965 blacks should have been making less than any pre-65 white agents. Certainly no pre 65 white agents should have been making less because of the "wage scale" differences.

Appendix Exhibit A attached to this Brief is striking in contrast. Appendix Exhibit A is submitted with the admission that comparisons are meaningless without knowing each individual's job requirements and other factors affecting salary. It is presented to show only that what petitioners claim was occurring pre Act and post Act in salaries of pre 65 black agents did not occur.

D. The Evidence shows the salary process to be nondiscriminatory

Private petitioners assert the factors affecting the salary process recognized by the courts, but omitted in their statistical cases, are imaginary. The evidence shows otherwise.

It is not disputed that the financial ability of each of North Carolina's 100 counties to support the local extension program and salaries of agents varies considerably between lower income counties and higher income counties and the percentage of salary support varies with each county. (C.A. App. 281 "B").

After an agent is employed in his or her county position, the salary of that person is affected by a number of factors each year and are not imaginary. (C.A. App. 281, 639).

Counties provide across the board increases in salary ranging from 2 to 12%. Not every county provides an across the board increase each year and many give no increase at all for several years. An agent who receives 5,000 in county portion of salary and gets no county increase would stay at 5,000.00. But an employee in another county who also got 5,000 from the county and got an across the board of 10% would get 500.00 ahead in one year on county salary. (C.A. App. 639-640).

Conversely, in an across the board state increase the state portion of an agent's salary is also subject to the *same factors* as the county portion. (C.A. App. 223 "B"). That percentage of increase affects *only* the state/federal portion of the county professional's salary is automatic and non-discriminatory. (C.A. App. 647).

In a county where the state/federal contribution is 60% and the county is 40%, the effect will be different from a county in which the percentage is 44.7%/55.3%. (A. 2184).

NCAES does not take state salary money from those counties who are supporting the extension program to fund county raises in those counties who do not support the program. This factor causes a variance as well. (C.A. App. 648).

In addition to the variances which are created in county level professional personnel by virtue of the county/state percentage of funding, across the board or merit, the evidence shows other factors which affect the salary of each county agent.

Tenure is a factor which is undisputed as affecting salary. (C.A. App. 626, 281). Educational level position and degrees are factors. (C.A. App. 626, 281). The area of responsibility and size of the program of an agent are factors. (C.A. App. 626, 281). Another factor is the particular area of skill required by the particular county. In some instances it is necessary to pay more to get a particular skill which is needed. (C.A. App. 628, 629). Another factor which affects salaries is inflation. Inflation causes starting salaries to rise almost to the level of salaries paid to agents with 2 or 3 years tenure. Adjustments must be made to bring senior agents up to now agents salaries. (C.A. App. 629-30).

Job performance is also a factor which undisputedly affects merit pay raises of objects as seen by the quartling process. (C.A. App. 814-818, 1374-1375).

Quartiles are used because that agents' individual jobs are not comparable with other agents and an agent competes against his or her own performance goals. (Pet. App. 113a).

It is impossible to measure the performance of an HEA working to solve nutrition problems in Bertie County with the performance of an HEA working in clothing in Mecklenburg. Each HEA's responsibilities are different in that each is teaching in a different educational environment with different educational goals. If all HEA's screwed caps on bottles there would be a basis for comparison of agent to agent, but not so here.

Another factor ignored by petitioners is that the practical maximum salaries the county extension professionals can receive are affected in *each county* by the salary paid to the CEC. The salary paid the CEC sets the maximum for agents regardless of title, tenure, degree, performance, responsibility or program. (DX 67-1-67-100, 196, C.A. App. 632, 2210). The evidence shows that factors, in great measure, are completely *non-discretionary*, over which NCAES has no control the courts found were not abused and distorted. Both the district court and court of appeals recognized this fact. (Pet. App. 112a-113a, 383a).

E. Petitioners' statistical cases were properly rejected

At trial, the petitioners anchored their salary discrimination claims almost entirely on the statistics not related to these known factors. The petitioners' cases boil to the utilization of three "factors" of salary comparisons between blacks and whites with NCAES. These are race, tensure and degree. They utilized averages of salaries between blacks and whites, "comparisons" and multiple regression analysis in an attempt to prove discrimination in salary on the basis of race.

In view of the proven factors, which have an effect on salaries of NCAES county level employees, the lack of inclusion of those factors into the salary exhibits promul-

gated at trial by the plaintiffs showing "comparisons" of salaries failed to impress the Court. The district court held that the numbers just did not measure up to showing, explaining or proving plaintiffs' case. (Pet. App. 143a). The court of appeals likewise refused to be taken in. (C.A. App. 387a-388a).

The parties utilized two expert statisticians in connection with multiple regression analyses of salaries. Dr. Mann (Pls and US) and Dr. Gieshbecht (NCAES). The district court found the regression insufficient because they omitted major factors which clearly affected salary. (Pet. App. 132a-146a, 388a). In connection with a discussion of invalidity of the regression analysis, the district court referred to the case of *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981); 695 F.2d 134 (5th Cir. 1982), affirming findings of no discrimination previously affirmed. *Wilkins* is parallel to *Bazemore* with regard to statistics and the affect of the various factors which relate to salary, hiring and promotions: Chief Judge Gee stated:

> "Because of the significant role that statistics play in discrimination case and of their inherently slippery nature, it is imperative that they be used properly." 654 F.2d 395.

Here, the omission of valid factors proven to have an effect on salary prevented the regression from being an adequate tool.

Neither Dr. Mann nor Dr. Giesbrecht were qualified subject matter experts. Both declined to testify that they were qualified to know what subject matter variables such as job performance, county salary percentage, subject matter areas or size of subject matter responsibility should be, or not be, included in the models and the effect of such inclusion or omission except to say it would have an effect. (C.A. App. 412, 474, 475, 1523, 1524, 1530).

Neither statistician utilized in their models the factors reflecting size of county salary, size of state salary, merit increases, across the board increase, area of responsibility,

the size of the programs, job performance, skills, market demand, or prior experience. Both agreed that if a variable could explain salary more precisely, then they would want to see its affect on the model. (C.A. App. 450-456, 1463-1465).

The petitioners' regressions failed to separate the responsibilities of the CEC and the CEC's highest pay. (C.A. App. 446). The regressions in which county chairmen were omitted showed a reduction in the so-called race coefficient. (DX-277). The district court found the failure to exclude the CEC from the models was improper. (Pet. App. 139a).

The failure of the regressions to prove much of anything is further proved by the fact that the petitioners' regressions, using only race, degree and tenure as variables, accounted for only 53% of the total salary variation that existed among agents and chairmen on that date. 47% of the variation is not explained. (C.A. App. 396, 1464-1468, 2332, 1691-1716, Tr. 6056, 6065, 6082).

NCAES offered a series of scattergrams showing the relationship of salary to tenure between black and white agents for the years covered by the regressions. (C.A. App. 2326-2332). When plotted out in graph form, the salaries are displayed in a completely random distribution. Dr. Giesbrecht testified the distribution was random and that meant he saw "no pattern". (C.A. App. 1153-54).

In *Wilkins*, Judge Gee stated:

> "The fundamental flaw in plaintiffs' statistical evidence is that it fails to take into account the fact that a number of factors operate simultaneously to influence the amount of salary a faculty member receives." 654 F.2d 402.

The district court found the same fatal flaws in petitioners' cases. (Pet. App. 148a-150a).

The burden of establishing valid statistics was never met by petitioners and was thus unacceptable to both the

district court and the court of appeals. (Pet. App. 387a-391a).

F. The Petitioners failure to include known factors affecting salaries was deliberate and not the result of surprise

Although the U.S. now acknowledges in its brief that it is undisputed "in this case that salary level varied among the various counties" and that the court of appeals was correct that such a major variable affecting salary should have been accounted for in petitioners' case, the U.S. asserts that petitioners should be excused from having omitted it from the regression analyses because petitioners did not have any knowledge of its existence, along with other variables, until the "brink of trial" when those variables were purportedly first identified by NCAES. The U.S. now acknowledges that the salary of agents is affected by a "complex matrix" of salary decisions, including merit raises, cost of living increases and county to county variations in salary increases. (U.S. Br. 21, n.19, 30, n.30).

Petitioners knew of the complex matrix and myriad of factors and differences affecting individual employment in NCAES as early as 1975 and simply elected to disregard them in favor of an across the board average approach to this case which compared black average against white average and utilized regressions which used race, tenure and title. Petitioners left out performance, a major factor because they were challenging the quartile rankings for determining merit (performance) pay. (U.S. Br. 34, n.34).

The differences between counties and agents jobs were apparent to anyone who read the pre-1974 discovery. NCAES's Memorandum in opposition to *both* petitioners' motion for class certification filed January 23, 1975, stated:

> "As each county varies in size, population, needs and requirements, wealth and resources, the salaries

> of agents vary in size from county to county, together with the volume and extensiveness of services provided by county extension staffs. . . .
>
> . . . A review of salary differentials between agents and home economics agents of equal tenure vary from county to county. The specific factors peculiar to each county's needs and requirements play a role in such differentials . . ." (Def. Br. 1/23/75 p. 7-8)

This was written six (6) years before trial. The district court recognized these facts and denied class action because agents were not linked by similar job conditions or commonality. (J.A. 74-79). In 1981, petitioners took depositions again of NCAES' director and associate director. Following those, petitioners renewed the motion for class certification asserting across the board racial discrimination. Citing specific deposition testimony given in 1981, NCAES pointed out the factors affecting agent's individual employment and the lack of similarity in jobs and salaries.

> "Although salaries of assistant, associate and full agents and the county chairmen have minimums established which NCAES and each county must meet, salaries from county agent position to county agent position vary with each county above the minimum level . . .
>
> Salary levels for the same position as associate agent or for that matter, county chairman, differ from county to county. In fact there are some counties where agents make more than county chairmen in other counties. (Def. Mem. 7/27/81.8-9, J.A. 37)

NCAES listed 15 factors affecting salaries of agents, excluding across the board NCAES raises. After listing them, NCAES's stated that assertions by petitioners that they were discriminated against in salary without providing details including variables affecting salary would be insufficient to prove their assertions. (Memo. 9, 15).

It is evident that petitioners were aware of the differences between agents in work and salaries well prior

to trial and that petitioners had to knowingly and deliberately disregard them as they prepared their case in favor of meaningless averages and unreliable regressions which failed to explain or prove much of anything. (Pet. App. 379).

Neither the district court or court of appeals, who carefully took the time to review the evidence, were misled. Both courts refused to accept the comparisons and regressions as proving discrimination because they did not reflect the facts and found it "defied logic" to make comparisons of salaries between counties. (Pet. App. 387a-388a).

With the petitioners spurious across-the-board "wage scale", "surprse" and "imagination" arguments exposed, the correctness of the salary claims decisions is clear and the decisions should be affirmed as correct.

II. THE COUNTY CHAIRMAN SELECTION CLAIMS WERE PROPERLY REJECTED

The district court held that the "Claims of plaintiffs based on alleged racial discrimination by the Extension Service in the selection of county chairmen must fail." (Pet. App. 101a). This holding was affirmed unanimously by the circuit court. (Pet. App. 423a, 425a).

Petitioners contend that neither the district court nor the court of appeals gave proper weight or analysis to their statistical cases and inaccurately argue that the decision of the court of appeals is in conflict with *Arizona Governing Board v. Norris*, 403 U.S. 1073 (1983).

Petitioners have caused the CEC claims to be distorted because they now argue that discrimination had been proved and but for faulty analyses by both courts below, they would have won on this issue. (Pet. Br. 70-71).

Petitioners utilized two methods in attempting to prove their claims of racial discrimination in selection of County Extension Chairmen (CEC). The first was by the use of raw statistical data showing the numbers of whites versus

blacks from 1962/63 through 1981 and various comparisons stemming from that raw data. (J.A. 114-127). The second method was to challenge the individual CEC selections in which blacks applied but were not selected from 1970 to 1981 with a sprinkling of so-called "futility applicants" thrown in for added effect.

The district court, after hearing the evidence, found that in each instance where blacks applied but were not selected, there was no racial discrimination shown and that the NCAES had offered legitimate non-discriminatory reasons for each decision contested. As far as the so-called "futility applicants", the district court reviewed their reasons for not applying for vacant positions and found them not to be credible. (Pet. App. 94a, 95a, 100a, 101a, 227a-317a). Petitioners attempt to sweep these factual determinations under the rug. Findings based upon the evidence cannot be disregarded. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's decision on individual claims shows why petitioners have chosen to reveal only the statistical side of their CEC claims.

Petitioners complaints about the failure of their statistical case are without merit. Petitioners disregarded the fact that the position of CEC is a position requiring special qualifications and numerical comparisons including race and tenure standing alone are meaningless.

The record is quite clear that the CEC position requires special qualifications, including leadership. (C.A. App. 275 "B"). The requirements for the CEC vary because the needs of the individual county vary. (C.A. App. 213 "Y") It is undisputed that each CEC must carry particular subject matter expertise, depending on the county where the CEC position is open. (C.A. App. 220 "B"). Thus not every agent with sufficient time, title and subject matter expertise is qualified to apply for any CEC position that becomes vacant. An agent with expertise in dairying is not going to fit where the need is for specialty in tobacco. Petitioners simply ig-

nored the facts in preparation and presentation of their statistical cases.

The "statistical" evidence presented clearly shows that all petitioners did was to compare black agents with white agents, by sheer numbers or by tenure and degree. They failed to show the special qualifications needed for the positions. Where special qualification are needed to fill particular jobs, such general comparisons lack probative value. *Hazelwood, supra* and *Teamsters, supra.*

Peteitioners also disregarded that the CEC position is one which, in addition to requiring particular skills to fit the county's needs, carries administrative and supervisory responsibilities. It is undisputed that the CEC is responsible for making hiring, salary, promotion, evaluation and staffing recommendations but is also responsible for carrying out an effective extension program. (C.A. App. 220 "B").

The district court recognized the position of CEC for what it is and correctly rejected the petitioners broad brush approach.

> "Plaintiffs' statistics are flawed in a further respect in that they include the assumption that every black full agent at the county level was qualified to fill the position of county chairman. There was an utter lack of proof to substantiate such a claim, and the persistent efforts of defendants through discovery and all the way through trial to require the plaintiffs to identify the qualified labor pool from which this position should be filled met with no success." (Pet. App. 89a-91a)

The district court also found the position required special qualifications and that the officials participating in the NCAES selection process were fairminded and acted without racial bias or prejudice. (Pet. App. 89-91a).

The district court properly extended the pre Act (1962/63) numbers game.

> "Thus, in order to be valid, a statistical analysis such as the one presented here must exclude those persons hired prior to [March 24, 1972, the effective date of Title VII for public employers]. To include pre-Act hires in the statistical analysis in this case would improperly weight the evidence and would tend to show present discrimination by an employer if it had discriminated prior to the effective date of the Act but had not discriminated after the Act took effect."
>
> *EEOC v. United Virginia Bank, supra,* at 150." (Pet. App. 85a-89a)

Petitioners also attacked the district and circuit courts' analyses of the 1972 county chairmanship selections as "unorthodox" and erroneous. The district court's analysis was not unorthodox and the district court found no discrimination in each individual claims of CEC contested by petitioners. (82a-87a, 226a-316a).

A review of the district court decision shows the district court, rather than placing great weight post-Act statistics analysis, considered that the figures only served to point up their inherent unreliability to prove an inference favorable to one side or the other. (Pet. App. 81a).

The bottom line is that the district court found that NCAES had rebutted the statistical case by showing inaccuracy of proof, had adopted valid and non-discriminatory procedures for selections of CECs and had followed the procedures fairly, without bias or prejudice. (Pet. App. 100a-101a).

The court of appeals unanimously affirmed the district court's finding of no discrimination in the CEC selection claims. In so doing, the court of appeals duly noted that the district court's analysis of post-Act decisions from 1972 was proper under *Hazelwood* and that the district court had found there was no finding of intentional discrimination against any individual who had sought the chairmanship. (Pet. App. 406a, 422a). The court of appeals found that the raw comparison statistics

proffered to establish a prima facie case did not "tell the full story" (Pet. App. 407a) and acknowledged that *Hazelwood* required employers be given the opportunity to approve that each of its post-Act employment decisions was made in a non-discriminatory way. (Pet. App. 407a-408a).

The court of appeals then addressed the CEC statistical analysis of the district court and stated:

> "While there may be some justification for the method of analysis by the district court, if we should consider that discrimination is against people and not applications, we think that, without deciding that either method is correct, a comparative analysis is worthwhile" (Pet. App. 412a).

The court of appeals then proceeded to focus on the recommendations made by NCAES instead of on the overall results. The result of such analyses led the court of appeals to find that the applications of blacks were approved at the same rates as whites, that raw statistics were completely refuted and even if the Extension Service had a burden to prove its decision free from discrimination it had done so. (Pet. App. 412a-423a).

Thus, both courts looking at the data in more than one method of analysis, came to the conclusion that petitioners statistics failed, but that in any event the NCAES had proved its CEC process and decisions were free from racial discrimination.

Having lost resoundingly at trial and on appeal, petitioners have now turned to arguments which infer the district court found a prima facie case of discrimination and that the error was in the determination of who was responsible for that discrimination. (Pet. Br. 70-71).

Petitioners assert that the court of appeals' analyses resulted in a decision to the effect that NCAES could delegate its final decision to the county commissioners and thus not be liable for their racial discrimination in selection. This is based on the incorrect assumption that there was proven discrimination in the actions of the

county commissioners in each selections challenged and disregards the fact that the district court examined each individual instance and found no evidence on racial discrimination in the selection by anyone. Yet, petitioners represent to this Court:

> "If, as actually occurred, the counties invariably preferred that NCAES hire only white chairmen, the fourth circuit held that NCAES had no legal responsibility for the result." (Pet. Br. 74)

This misleading statement launches petitioners' sidetrack argument that this case was just like *Arizona Governing Board v. Norris*, 403 U.S. 1073 (1983). *Norris*, was decided because the facts showed that there was a violation of Title VII with respect to a sex based retirement plan administered by a third party. The underlying situation in *Norris* that the complained of plan was in fact sexually discriminatory was not at issue. Here, the facts and evidence found by the district court showed no discrimination. (Pet. App. 82a-87a-226a-316a).

The analysis of applications and recommendations by the court of appeals differed from the district court's in that it looked at recommendations by NCAES on which to apply its statistical analysis and in so doing found no discriminatory pattern. However, neither did the court of appeals find discrimination by the county commissioners en route to that conclusion. Nor did the court of appeals hold that the NCAES was not responsible for the decisions made in the CEC process. The court of appeals observed that "The Extension Service is not separately responsible for the appointment to fill the vacancy, but it is separately responsible for the recommendation of one or more of the applicants." (Pet. App. 412a-413a).

The petitioners' arguments that the decision violates *Norris, supra*, must be disregarded.

The U.S. properly realizes that *Norris* has no application or relevance in this case. (U.S. Br. 35-36). The

U.S., however, complains about the analyses of the "statistical" case with respect to the applicant flow and recommendations by the court of appeals. However, the U.S., like the petitioners totally glosses over the fact that no discrimination in any selection was found and that notwithstanding whether a prima facie statistical case was made on the basis of raw data, it was completely refuted. (Pet. App. 422a-423a). The decisions of both the district court and court of appeals should be affirmed.

III. NCAES' 4-H AND EXTENSION HOMEMAKER CLUBS ARE NON-DISCRIMINATORY AND IN COMPLIANCE WITH TITLE VI

NCAES, as do all other Extension Services, sponsors two voluntary participation community programs, 4-H and Extension Homemaker Clubs. Petitioners assert that the district court and panel majority incorrectly denied petitioners' claims with respect to an alleged affirmative duty on part of NCAES to force integrated membership in local Extension Homemaker Clubs and 4-H Clubs existing in racially mixed communities. Petitioners compare this to is a school case and utilize the catch phrase of "freedom of choice" plan to fit these voluntary programs into *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), which is inapplicable.

Extension Homemaker Clubs. Extension Homemaker Clubs are voluntary, volunteer groups formed in communities by adults and receive home economic and other advice and support from NCAES. It has been the policy that all extension homemaker clubs are to be organized without regard to race. NCAES agents encourage the formation of new clubs without regard to race. Announcements of this policy are published in the media. Despite this, clubs of one race exist and so do many clubs of both races (Pet. App. 165a).

There has been no evidence presented that since the adoption of this policy for extension homemaker clubs that one single black or white person has sought and been

denied membership on the basis of race in an extension homemaker club in North Carolina. (Pet. App. 166a-172a).

Indeed, *not one* of the thousands of members appeared at trial to testify of any racial discrimination in the Extension Homemaker Clubs or programs.

NCAES has created an integrated environment and the district found:

> "the evidence shows, and plaintiffs do not questions that for all phases of club activity above the community club level, all extension staff and volunteer leaders, all county wide, district and state meeting and training sessions are fully integrated." (Pet. App. 168a-169a; FN 53)

4-H and Youth Program. The 4-H and Youth Program is designed to develop good citizenship, character and to teach youth useful and practical skills. North Carolina ranks 7th in the United States in terms of black youth participation in 4-H. (Tr. 5107). 4-H is a voluntary program not a mandatory public school system. It is significant that from 1972 to 1980 participation by black youth rose to 30,243, while black volunteer leadership increased from 2,665 in 1972 to 4,022 in 1980. (DX 227).

Membership in 4-H is not static. It is open to youth 9 to 19 and membership is constantly changing. About ⅓ of the units are reorganized each year and consequently, the clubs are not static. (Tr. 5107) Out of the thousands of persons, black or white, who participated in 4-H from 1965 to time of trial, none came forward to testify that he or she had been discriminated against in connection with the 4-H program.

Except for the one incident involving a 4-H youth and volunteer leader, there has been no evidence presented of any person, black or white, being denied participation in or subject to discrimination in the 4-H program in North Carolina. 4-H is completely integrated in all activities beyond the community 4-H club level and has been for many years. (Pet. App. 167a-169a).

Black participation in 4-H has risen and not declined. This is conclusive proof that blacks participating in the 4-H programs in North Carolina do not consider their membershaip in the 4-H clubs "a badge of slavery" as petitioners previously argued.

Petitioners assert that NCAES failed to follow administrative "affirmative action" regulations. At trial Petitioners claimed "affirmative action" required all clubs of one race in a mixed community to merge with clubs of another race and if not the Extension Service would be required to withdraw services. (Pet. App. 166a-167a).

The district court found the 4-H and extension homemaker programs met the requirements of Title VI and were operated without discriminatory intent or purpose. (Pet. App. 170a-183a).

The district court also recognized that this was the sar situation as "freedom of choice" school cases such as *Green* and that this is not a "freedom of choice" case. (Pet. App. 174a).

The critical issue facing the district court was what does the law require NCAES to do with respect to the existence of one race volunteer clubs which exist in racially mixed communities when there is no evidence of discrimination? Petitioners contended NCAES should require these clubs to merge with clubs in the same community that are another race, and should those efforts fail, to withdraw NCAES's services from those clubs. (Padgett Tr. pp. 1392, 2286; Reibman Tr. pp. 3231-3234).

The question is threefold. First, does the mere existence of a community extension homemaker club or a community 4-H club with members of one race existing in a racially mixed community violate Title VI and equal protection secured by the 14th Amendment? Second, do the USDA guidelines and their interpretations of all reasonable efforts have the force of law so that they must be followed by NCAES? Third, does the policy advocated

by the plaintiffs that services should be withdrawn from clubs located in mixed communities who have not denied membership on the basis of race to anyone, but remain all of one race, violate Title VI? Neither court below had to reach this last question to decide the case. (C.A. App. 62).

NCAES contends that the district court was correct in finding that the mere existence of an extension homemaker or 4-H club of one race which exists in a mixed community does not violate Title VI since there has been no exclusion, discrimination or denial of the benefits of the program.

Petitioners argue NCAES violated Title VI because it allegedly did not follow USDA guidelines which interpreted Title VI and the regulations promulgated thereunder with respect to the requirement of "all reasonable efforts" to achieve integration of clubs which exists in racially mixed communities. (Pet. Br. 94-95). An examination of the USDA regulations promulgated under Title VI, 7 CFR 15.1, *et seq.*, shows an absence of any requirement that an extension service withdraw services from a recipient of a program who has not subjected another person to discrimination on the basis of race.

At trial the district court requested the Petitioners to furnish authority that the USDA guidelines and interpretations of those guidelines with respect to the "all reasonable efforts" provisions are mandatory and must be followed by NCAES. No such authority has yet been furnished or cited. The reason is simple. Guidelines and interpretations are not regulations and are not mandatory. *United States v. City of Chicago*, 573 F.2d 466, at 427 (7th Cir. 1978), *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979).

Despite this, the Petitioners argue that the USDA's "guidelines" are mandatory and a one race club existing in a mixed community would be subject to the withdrawal of NCAES services for remaining one race. The only rea-

son for the withdrawal of services in such instance would be on account of race of the members, black or white, which we contend violates Title VI. The evidence clearly shows NCAES has taken appropriate affirmative action in 4-H and Extension Homemaker programs.

IV. THE DENIAL OF CLASS CERTIFICATION WAS CORRECT

This action was initially filed as a class action seeking purported class wide relief pursuant to Rule 23, Federal Rules of Civil Procedure on behalf of 4 proposed classes and 1 class of defendants. The four classes of plaintiffs were (1) all black and Indian employees of NCAES from November 18, 1971 thereafter (2) all black and Indian persons receiving services from NCAES on November 18, 1971 and thereafter (3) all black and Indian members or potential members of NCAES 4-H Clubs on November 18, 1971 and thereafter and (4) all black and Indian members or potential members of NCAES Extension Homemaker Clubs on November 18, 1971 and thereafter. The proposed defendant class were all county commissioners in North Carolina in their official capacities on November 18, 1971 and thereafter. (C.A. App. 46)

Following discovery both petitioners filed motions seeking certification of all 5 classes in January, 1975. NCAES opposed the class certification motions. On October 9, 1979, the district court denied certification as to all proposed classes. (J.A. 74-79) After re-opening discovery in July, 1981, the private petitioners again moved for class certification by means of a motion to reconsider. NCAES opposed the motion. On July 28, 1981, the district court denied the motion again because of lack of commonality and similar situations. (J.A. 87) Private petitioners continued to press for class certification even though the action was proceeding as a pattern or practice action seeking relief as broad as any possible under Rule 23.

The case was tried as a pattern or practice case. The private petitioners post-trial submittals incorporated all

of the relief set out in the United States' post-trial proposed decree and sought identical relief. (Pets. Mem. and Proposed Conclusions of Law and Fact filed 2/8/82)

Because of the previous discussions concerning the organization of NCAES, the operation of the employment practices, 4-H and Homemaker Extension Clubs and Boards of County Commissioners it is not necessary to the facts which clearly show that no class certification was permissible under Rule 23. NCAES respectfully directs the Court's attention to the district court's decision and the Statement of Facts contained in this Brief as to why the employee class was correctly denied. It is clear that NCAES county personnel are not situated in similar across the board jobs. The hiring and salary from county to county varies and the actions of 100 autonomous and separate Boards of County Commissioners do not affect any class of blacks or whites. Blacks are scattered throughout the state, each holding different jobs and performing different responsibilities. The only commonality is race and that factor is insufficient for class certification. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

The petitioners do not seek class certification the class which purportedly consisted of all black recipients of services. As pointed out earlier, the claims of discrimination in services were denied as no evidence was presented to support any such claims.

With respect to classes 3 and 4, the 4-H and Extension Homemaker Clubs, the district court found that at trial no members of the purported class of plaintiffs appeared, that there was no evidence that any black female was ever denied membership in any club, was provided inferior services or discriminated against by NCAES in connection with home economics or extension homemaker clubs. Likewise, there was no member of the purported class of 4-H members who appeared at trial to testify nor was there any evidence that any black child had been denied

services or membership in a 4-H Club except for 1 instance which was immediately corrected. There was no evidence of any denial of membership or services or inferior services whatsoever. (C.A. App. 47-48)

The district court found that all that was present were "bare, conclusory allegations of the complaint" unsupported by any evidence and that such was insufficient to establish a class. (C.A. App. 47-48)

The court of appeals noted that:

> "the plaintiffs do not take exception either to the findings of fact of the district court or to its conclusion that the class should not have been certified on the basis relied upon by that court". (Pet. App. 370a-371a)

Since there was no evidence of discrimination in the first place, there was obviously no class to exist.

Petitioners still claim error in refusing to certify a class of defendants of all county Boards of Commissioners in 100 counties in North Carolina. The decision to deny class certification of this purported defendant class was correct. Boards of County Commissioners are independent autonomous entities. The actions of one are not binding on another. Just as local boards of education are independent, Boards of County Commissioners are likewise. Each board makes its own decisions. There was no evidence of any standardized practice among the 100 separate counties in the state and many counties had no black NCAES agents or populations which were miniscule. (Pet. App. 47a-48a)

This Court's decision affirming denial of class certification of 92 South Carolina independent school districts supports the decision. *United States v. State of South Carolina*, 434 U.S. 1026 (1979) as did *Paxman v. Campbell*, 612 F.2d 848 (en banc) (4th Cir. 1980) holding class certification of 130 Virginia Boards of Education inappropriate. Nothing further needs be said here. Denial of class certification was correct.

Petitioners, however, leave the facts out of their class action arguments to this Court and launch into misleading arguments to the effect that the class action decision literally stood *General Telephone* on its head. This argument is brought about because both the district court and the court of appeals correctly recognized that the case was tried hand in glove by petitioners as a pattern or practice action and that the relief available was the same as if a class had been certified. *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980).

The decision of the district court was characterized by petitioners as holding that class certification was never permissible in a Title VII action if the EEOC or United States had also filed a pattern or practice suit. (Pet. Br. 100) This characterization is inaccurate.

General Telephone permits the government to seek and obtain relief on behalf of a group of aggrieved individuals under Title VII without having to comply with the strictures of Rule 23. *General Telephone*, *supra*, 331.

General Telephone held that the government could seek relief as broad as possible without being tied down to Rule 23 regardless of the lack of typicality or commonality of claims between persons for whom relief was sought. Nowhere was the *General Telephone* rationale more welcomed than here where no class was found to be proper under Rule 23. (J.A. 73-79) Hre, rather than lose the clout of a class action, the pattern or practice action permitted petitioners all the relief they could have gotten if successful as a class. Because of this the district court determined correctly that under *General Telephone* class action certification is unnecessary and to *require* it is inappropriate in pattern or practice actions. This was because Rule 23 cannot be imposed to limit a pattern or practice claim nor can the failure to meet Rule 23 be a bar to a pattern or practice claim. A reading of the district court's decision on class action denial will clearly show *General Telephone* was not stood on its head. (Pet. App. 33a-47a)

Petitioners have failed to point out a single disadvantage which has accrued to them at trial by not receiving class certification. Had they won, the relief they requested was the same as that sought by the U.S. (Pet. App. 373a)

Finally, in a last ditch effort to further confuse the class question and direct attention from the fact that petitioners had all the relief available to them by virtue of the pattern or practice case and suffered no prejudice by the correct decision denying the classes, petitioners muddy the picture claiming the court of appeals decision conflicted with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). That decision has no application here. *Eisen* involved two issues whose relevance, if any, to this case is highly questionable. The first was whether or not the determination of class certification and requirements that defendants pay a part of the statutory notice requirement were "appealable" as a "final order" under 28 U.S.C. 1291 and the second was whether the district court's order directing defendants to pay part of the cost of notice after a hearing on the merits was in violation of Rule 23.

Any resemblance of *Eisen's* issues to the district court or court of appeals appears to be imaginary. The district court denied certification after discovery. The simple fact is that the petitioners proceeded with the U.S. hand in glove seeking identical relief at trial. When they lost, they claimed error in class certification but have shown no prejudice because of it and the facts show certification was inappropriate here.

CONCLUSION

For the reasons stated above, the decisions of the district court and court of appeals should be affirmed.

Respectfully submitted this — day of February, 1986.

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APPENDIX

EXHIBIT A—COMPARISON CHART

This exhibit compares salaries of black agricultural agents who were employed by NCAES on July 1, 1965 and as of July 1, 1972, were full agricultural agents with salaries of white agricultural agents who were employed by NCAES on July 1, 1965 and as of July 1, 1972 were full agricultural agents. The salaries compared were those of both groups on July 1, 1972. The only information provided is county and salary as of July 1, 1972. White agents are designated as "White". The comparison does not include performance or other factors affecting salary. There are 42 black agents in this group. There are 65 white agents. Asterisk by those, black or white, who later applied for and were appointed County Extension Chairmen.

SOURCE OF DATA: GX-56; GX-125; PX-2; JA. 114-126

LeRoy Johnson (1890 program)	$16,900.00	
William S. Lamm—Wayne	$15,458.00	WHITE* Became CEC
Thomas H. Godwin—Wayne	$15,361.00	WHITE* Became CEC
Charles M. Turner—Rockinham	$14,930.00	WHITE
Frank H. Baker—Wayne	$14,562.00	WHITE* Became CEC
T. D. Williamson—Rockingham	$14,486.00	
George McDaniel—Wayne	$14,239.00	
Franklin Greene—Rockingham	$14,027.00	WHITE
P. E. Bazemore—Union	$13,984.00*	Made more than 47 CEC's 1971
Glenn Gartner—Mecklenburg	$13,764.00	WHITE
Booker T. McNeil—Cumberland	$13,724.00*	Became CEC
William Wright—Nash	$13,418.00	
B. A. Hall—Guilford	$13,358.00	
Walter P. Farrior, Jr.—Wilson	$13,342.00	WHITE
William Mainous—Forsyth	$13,328.00	WHITE
S. N. Shelton—Orange	$13,302.00*	Became Program Leader
Cyrus A. Greene—Orange	$13,248.00	WHITE
Ray A. Kiser—Stanly	$13,032.00	WHITE
John D. Carroll—Guilford	$12,962.00	WHITE
Walter H. Bowers—Montgomery	$12,955.00	WHITE* Became CEC

Elbert E. Bishop—Cabarrus	$12,942.00	WHITE
Hernando Palmer—Johnston	$12,886.00	
Connie Jernigan—Cumberland	$12,785.00	WHITE* Became CEC
Howard L. Dalton—Guilford	$12,699.00	WHITE
Plese Corbett—Alamance	$12,684.00	
Wade W. Johnson—Davidson	$12,574.00	WHITE
David Waymer—Mecklenburg	$12,516.00	
Leonard Allen—Johnston	$12,432.00	WHITE
Judge A. Pierce—Rockingham	$12,414.00	WHITE
L. Baldwin—Franklin	$12,373.00	
Carol Baker—Union	$12,331.00	WHITE* Became CEC
Howard Stamey—Iredell	$12,294.00	WHITE
Lloyd Peace—Vance	$12,270.00	
Murray L. Godwin—Chowan	$12,254.00	WHITE
Kenneth E. Vaughan—Chatham	$12,230.00	WHITE
Donald W. Baker—Columbus	$12,225.00	WHITE* Became CEC
Horace L. Miller—McDowell	$12,218.00	WHITE* Became CEC
Earl Swann—Alamance	$12,200.00	
H. Eugene McCall—Haywood	$12,166.00	WHITE* Became CEC
Roderick Morris, Sr.—Bladen	$12,120.00	WHITE
Burton H. Taylor—Guilford	$12,093.00	WHITE
John Vanstory—Caldwell	$12,080.00	WHITE
Douglas Young—Randolph	$12,066.00	WHITE
George P. Upton, Jr.—Sampson	$12,048.00	WHITE
L. Cooper—Warren	$12,045.00*	Became CEC
Bobby Peek—Buncombe	$12,020.00	WHITE
Earl H. Smith—Henderson	$12,020.00	WHITE
M. C. Howell, Jr.—Union	$11,992.00	WHITE* Became CEC
Guyler F. Heath, Jr.—	$11,969.00	WHITE
James P. Bowles—Cabarrus	$11,950.00	WHITE
I. W. Murphee—Granville	$11,918.00	
Madison K. Dennis—Bladen	$11,916.00	WHITE* Became CEC
Robert M. Bowden—Vance	$11,882.00	WHITE
Richard A. Hayes—Greene	$11,867.00	WHITE
James West—Wake	$11,864.00*	Became Dist. Chairman
Walden M. Hearn—Pasquotank	$11,824.00	WHITE
LeRoy James—Pitt	$11,743.00*	Became CEC
Fletcher Barber—Jones	$11,753.00	
Dan E. Baucom—Onslow	$11,729.00	WHITE
Riddick Wilkins—Duplin	$11,684.00	
Hoover Royals—Anson	$11,597.00*	Became CEC
Woodrow C. Richardson—Watauga	$11,584.00—	WHITE

Jack Barnes—Stokes	$11,546.00	—WHITE
R. M. Edwards—Martin	$11,541.00	
Chester Bright—Beaufort	$11,492.00	
John Spaulding—Columbus	$11,449.00	
Snodie Wilson—Duplin	$11,422.00	WHITE
James C. Weaver—Montgomery	$11,360.00	WHITE
C. J. Cameron—Scotland	$11,352.00	WHITE
James C. Barber, Jr.—Gaston	$11,351.00	WHITE
Slater Lloyd—Granville	$11,346.00	
Rufus H. Rhyne—Stokes	$11,336.00	WHITE
Cleo Greene—Pender	$11,301.00	
William Strowd—Perquimans	$11,267.00	
Howard Waynick—Lincoln	$11,260.00	WHITE
John H. Wynne—Pender	$11,240.00	WHITE
O. G. Garland—Swain	$11,131.00	WHITE
Douglas W. Easton—Northampton	$11,139.00	WHITE
Pieter J. Westerbeek—Sampson	$11,017.00	WHITE
James Wright—Hertford	$10,985.00*	Became CEC
Stanley C. Corriher—Rowan	$10,979.00	WHITE
P. Williams—Pasquotank	$10,875.00	
Boyd C. Campbell—Henderson	$10,785.00	WHITE (14)
Samuel Little—Pender	$10,772.00	
Clifton Grimes—Gates	$10,766.00	
Avant Coleman—Wilson	$10,712.00	
K. T. Patterson—Alexander	$10,681.00	WHITE
Herbert Sproles—Gaston	$10,666.00	WHITE
Wiley Payton—Lenoir	$10,620.00	
Al. L. Smith, Jr.—Lincoln	$10,622.00	WHITE
Joseph Turner—Chatham	$10,585.00	
V. J. Goodmon—Richmond	$10,559.00	WHITE
Walter E. Garrand—Person	$10,555.00	WHITE
George Bowers—Cherokee	$10,406.00	WHITE
Raymond D. Phillips—Halifax	$10,394.00	WHITE
William Clayton—Johnston	$10,366.00	
Clarence Stockton—Robeson	$10,333.00	
Fred Belfield—Nash	$10,324.00	
Warren Barnes—Union	$10,228.00	
Thomas W. DuVall—Madison	$10,130.00	WHITE
Everett Hartzog—Yadkin	$10,106.00	WHITE
Chester Stocks—Lenoir	$ 9,892.00	
Ernest Short—Rowan	$ 9,879.00	
George Koonce—Warren	$ 9,873.00	
Robert F. Breland—Ashe	$ 9,717.00	WHITE
Bobby C. Armstrong—Tyrrell	$ 9,345.00	WHITE
Calvin Hargrove—Edgecombe	$ 9,246.00	